In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-350

DONALD PAUL EASTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Iowa, petitioner was convicted on thirteen counts of mail fraud in violation of 18 U.S.C. 1341.[1] He was sentenced to concurrent five-year prison terms. The court of appeals affirmed (Pet. App. A).[2]

The relevant facts are stated in the opinion of the court of appeals (Pet. App. 9–12). Petitioner solicited funds from numerous persons on a pre-subscription

[1] Four additional counts were dismissed by the trial court at the close of the government's case. See the printed appendix in the court of appeals ("App."), which we are lodging with the Clerk of this Court.

[2] The judgment of the court of appeals was entered on April 15, 1971. The petition for a writ of certiorari was filed on June 28, 1971, and is out of time under Rule 22(2).

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agreement to purchase stock in "Educational Investment Corporation." He represented to those solicited that E.I.C. would achieve a high return on investment by purchasing contracts between educational institutions and students. Petitioner told some prospective investors that they would realize a return as high as 40 percent; he told others 30–35 percent; still others 11 percent. Petitioner initially indicated to subscribers that the corporation would be organized when $100,000 had been raised. He later raised the target amount to $200,000 without advising previous subscribers of this upward revision. Subscribers signed a subscription list and furnished petitioner with names of friends to solicit. In fifteen months petitioner collected $77,000, most of which he deposited in accounts in banks and savings and loan associations. During the same period he personally withdrew more than $34,000 from these accounts by means of checks drawn to himself and marked "promotion fees," "commissions" and "expenses." Petitioner wrote "lulling" letters to subscribers. A typical letter informed the recipient:

> "We have made fine progress * * * we have raised $81,000 * * *. In time you will discover that you have made a very wise investment. * * *"

At no time was $81,000 ever raised. In letters to other subscribers petitioner represented that he had raised $140,000 and $160,000. Petitioner never organized E.I.C. and made no application for a corporate charter.

The thirteen counts of mail fraud under which petitioner was convicted each involved a different subscriber to E.I.C. stock.[3] Petitioner raises no issue as to eleven counts which alleged that in furtherance of his fraudulent scheme he sent subscribers lulling letters through the mails. Since these counts alone support the sentence, the court of appeals was justified, as a matter of judicial convenience, in ruling that the counts under attack would not affect the judgment. *Benton* v. *Maryland,* 395 U.S. 784, 791.

In any event petitioner's attack on the two remaining counts is without merit. Count I concerned a check in the amount of $1,000 which, as reflected in the record, was payable to E.I.C. and drawn by one Lilly Cooper on the Cumberland Savings Bank of Cumberland, Iowa (App. 115). Petitioner cashed this check on April 6, 1966, at the State Savings Bank of Council Bluffs, Iowa. It cleared by mail through the Federal Reserve Bank of Chicago (App. 116). Count VIII involved a check in the amount of $1,000 payable to E.I.C. drawn by one Warren Tibbles on the Council Bluffs Savings Bank of Council Bluffs, Iowa. Petitioner cashed this check on August 23, 1966, and the drawee bank returned the cancelled check to Mr. Tibbles by mail (App. 211–213).

Where one does an act knowing that the use of the mails will follow in the ordinary course of business, he "causes" the mails to be used. *Pereira* v. *United States,* 347 U.S. 1, 8–9. See also *United States* v. *Kenofskey,* 243 U.S. 440. When petitioner cashed the

[3] The indictment is set out at App. 4–19.

checks he received from his victims, he had strong reason to expect that those checks would subsequently be sent through the mails, either during the process of clearing or when they were returned to the drawer after being cancelled by the drawee bank.

Relying on *Kann* v. *United States,* 323 U.S. 88, petitioner argues that, even though he caused the checks to be mailed, they were not mailed for the purpose of executing a fraudulent scheme within the meaning of 18 U.S.C. 1341 since he had received the proceeds of the check before the mailing. Unlike the situation in *Kann,* petitioner's scheme did not end with the cashing of the checks; petitioner continued to write lulling letters, make withdrawals from accounts, and use subscribers as references in further solicitations. See *United States* v. *Sampson,* 371 U.S. 75.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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